

91-408

Supreme Court of Missouri
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No. _____

In The
Supreme Court of the United States
OCTOBER TERM, 1991

ARTHUR BROWN
Petitioner,

vs.

THE CURATORS OF THE UNIVERSITY OF MISSOURI
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW*

The Curators of a state university have condemned private property for use solely by a private not-for-profit corporation as a parking area for its privately owned and operated scholars' center.

1. Is the taking a violation of the due process clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, even though some of the purposes of the private corporation and the operation of the center are supportive of and beneficial to the state institution?

2. Is the taking an unlawful delegation of legislative power because there is no applicable constitutionally or legislatively declared public policy or public purpose with objective standards and the taking is beyond the limited delegated powers of the Curators to condemn "for any public purpose within the scope of its organization?"

3. Is there a denial of procedural due process because no state constitutional provision or statute has specifically declared that the Curators may condemn land for use by a private agency, and the only determination of public use or necessity is by a resolution of the Curators adopted in a closed meeting, without evidence, notice or public hearing, unchallenged by the judicial proceedings?

* All parties to the proceedings are listed in the caption.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS,
WESTERN DISTRICT**

Petitioner, Arthur Brown, prays that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, entered March 19, 1991.

REFERENCE TO OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District is reported at 809 S.W.2d 64 (Mo.App. 1991) and is printed in Appendix A. A certified copy of the resolution adopted by the Curators on December 18, 19876 is printed in Appendix B. The Findings of Fact and Conclusions of the trial judge are unreported and are printed in Appendix C hereto. The order of the Court of Appeals denying Petitioner's motion for rehearing or transfer is printed in Appendix D and the order of the Supreme Court of Missouri denying transfer is printed in Appendix E.

JURISDICTIONAL STATEMENT

Review is sought of the opinion and order of the Missouri Court of Appeals, Western District, dated March 19, 1991. Petitioner's motion for rehearing was overruled and his motion for transfer to the Supreme Court of Missouri was denied on April 30, 1991. His application in the Supreme Court of Missouri to transfer the cause to that court was denied by that court on June 11, 1991.

The jurisdiction of this court to review the final decision of the state court is invoked under 28 U.S.C. 1257 (a).

**CONSTITUTIONAL PROVISIONS, STATUTES, AND
RESOLUTION OF CURATORS INVOLVED
IN THE CASE**

The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Constitution of the State of Missouri:

Article I. Bill of Rights

§ 28. Limitation on taking of private property for private use—exceptions—public use a judicial question

That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

Article IX. Education:

§ 9(a). State university—government by board of curators—number and appointment

The government of the state university shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate.

§ 9(b). Maintenance of state university and other educational institutions

The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary.

Statute

The state statute upon which Curators rely is R.S.Mo. 172.020 which provides in relevant part that the Curators shall have the power to condemn an appropriate real estate "for any public purpose within the scope of its organization." The full text is printed in Appendix F.

Resolution

The resolution of the Curators adopted at a meeting on December 18, 1987 provides in pertinent part:

That the institution of condemnation proceedings is hereby authorized to acquire said property owned by Arthur Brown, and herein described, along with all leasehold and possessory interest and rights of parties in possession, under the power of condemnation of real estate as provided in Section 172.020 RSMo (1977) for the public purpose of furthering the educational mission of The Curators of the University of Missouri, a public corporation, in developing constructing and establishing the Scholars' Center facility for the benefit and use of the University of Missouri.

The full text is printed in Appendix B.

STATEMENT OF THE CASE

A. Federal Constitutional Issues Raised Below

The issues were first raised in the trial court by Petitioner's Motion to Dismiss for Lack of Jurisdiction which claims that "the taking of defendant's private property which plaintiff seeks by exercise of its power of eminent domain is not for a public use and purpose as required by state and federal law and is unconstitutional." (L.F. 20) and "Plaintiff seeks by exercise of its power of eminent domain to deprive defendant of his property without due process of law in violation of state and federal law." (L.F. 21) The point was then argued in Petitioner's Suggestions in Support of his motion to dismiss, citing the Fifth and Fourteenth Amendments. The trial court's Findings of Fact and Conclusions of Law (Appendix C) overruled the motion but did not discuss the federal issue. Neither the trial court's order confirming confirmation, (L.F. 62) nor its judgment on the jury verdict (L.F. 71) discuss the issue. Petitioner's Motion for Judgment Notwithstanding the Verdict again raised the issue claiming:

The taking of defendant's property is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that it is a condemnation for a private use without the consent of the owner and without a legislative determination of public use. (L.F. 74)

The trial court overruled Petitioner's Motion for Judgment N.O.V., without opinion or comment. (L.F. 176)

The issue was preserved in petitioner's Notice of Appeal to the Missouri Court of Appeals (L.F. 182) and argued in his brief in that court. The court's opinion affirming the trial court (Appendix A) ignores the issue.

The federal constitution issue was last raised in Petitioner's Application in the Supreme Court of Missouri for transfer from the Court of Appeals, in which Petitioner argued again that the Court of Appeals ruling violated the Fifth and Fourteenth Amendments, prohibiting deprivation of property without due process of law. That court denied rehearing without opinion. (Appendix E)

B. Statement of Case

Petitioner is the owner of property condemned by the Curators of the University of Missouri, a state agency. He resisted that action claiming the Curators have taken private property for private use. The action arises out of the following facts.

Some years ago, Dr. E. Grey Dimond, a member of the University of Missouri at Kansas City (UMKC) medical faculty, acquired land near the medical school and built a residence. He then acquired several adjacent lots. Petitioner's house and lot adjoin Dr. Dimond's property.

Dr. Dimond conceived the idea of establishing a Scholars' Center (Tr. I-60).¹ To implement this, he formed a private not-for-profit corporation, Diastole-Hospital Hill, Incorporated, ("Diastole"), (Ex. 14) to which he conveyed part of his lots (excluding his residence).

¹ References are to the record in the Missouri Court of Appeals. References to Legal File are designated "L.F. ____." References to testimony are designated "Tr. I-____" or "Tr. II-____," All exhibits are designated "Ex. ____."

By Dr. Dimond's trust and will (Ex. 16 and 180), on his death all his assets pass to University of Kansas City (UKC)² if it exists and is a Section 501(c)(3) organization, to be used in connection with the Center. If it does not qualify, the trust assets go to Diastole. To fund operation of the Center he made a gift of \$337,686.75 to the Trustees of UKC. If UKC ceases to exist, the fund is to be distributed to Diastole if it then exists, if not to a 501(c)(3) corporation selected by UKC (Ex. 17, page 2). Both Diastole and UKC have perpetual existence.

Dr. Dimond could have conveyed or willed his properties to the Curators but chose not to do so (Tr. I-60).

In 1986 Diastole's by-laws were amended to have a three member board until Dr. Dimond should be unable or unwilling to serve, when the board would increase to 19 members, including various community persons, officials and lawyers, eight of whom would be UMKC officials (Ex. 16).

Dr. Dimond wanted to buy Petitioner's land to use as a parking area (although he had acquired other lots which could serve that need) (Tr. I-98 to 102). Dr. Dimond and Diastole attempted several times to purchase Petitioner's property but Petitioner was unwilling to sell, rejecting a final offer of \$150,000 (Tr. I-90).

Somehow, the Curators were made aware of Dr. Dimond's desires. September 11, 1987 at a closed meeting the Curators adopted a resolution (Ex. 6) authorizing its officers to execute an agreement with Dr. Dimond and Diastole (Ex. 3) which provided that Curators would seek to condemn Petitioner's property and Diastole would donate funds sufficient to cover the cost of acquisition. Curators would retain ownership of Petitioner's land for use in connection with the Center and Diastole would own and operate the Center and be responsible for all expenses of improving, maintenance and operating the land acquired by Curators. December 18, 1987 at a closed meeting the Curators adopted

² The University of Kansas City (UKC) is a private, not-for-profit corporation (Ex.2) and must not be confused with the University of Missouri at Kansas City (UMKC), a campus of the University of Missouri, a public agency of which the Curators are the governing body.

a resolution (Ex. 13) authorizing the institution of condemnation proceedings. The resolution provides that:

[T]he acquisition of the real estate herein described is necessary for the public purpose of developing and establishing the Scholars' Center facility to further the educational mission of the University of Missouri.

December 2, 1987 the Curators offered Petitioner \$32,000 to purchase his property (Ex. 8) which he rejected.

April 8, 1988 the Curators filed a petition in the Circuit Court seeking condemnation of Petitioner's property. Petitioner filed a Motion to Dismiss for Lack of Jurisdiction (L.F. 20). An evidentiary hearing was held on the jurisdictional issue in May, 1988.

Following Petitioner's filing of the Motion to Dismiss, Diastole amended its by-laws (Ex. 33), now providing for a board of directors consisting of Dr. Dimond, Dr. Harry Jonas and Professor Henry A. Mitchell (Ex. 33, page 5). At such time as Dr. Dimond should be no longer able to serve, the number of directors would be increased to five consisting of a person designated by the Mayor of Kansas City, Missouri, the Chancellor of UMKC or his designate, the Dean of the UMKC Medical School, the Dean of the UMKC Dentistry School and the manager of the Scholars' Center (Ex. 33 pages 4-5). The Articles of Incorporation of Diastole were also amended (Ex. 33) to provide that if Diastole should be dissolved its assets would be distributed to UKC, or if not then existing to a 501(c)(3) organization selected by UKC.

A second evidentiary hearing was held November 21, 1988. Just prior to the second hearing, the Curators, Diastole, the University of Kansas City and Dr. Dimond executed an agreement (Ex. 28-A) in which the Curators agreed to acquire Petitioner's property to provide access, parking and open space for use of the Center; the property condemned would remain under ownership and control of the Curators for use and development of the Center; all the properties except the residence would be used for the Scholars' Center but Dr. Dimond agreed to make a gift of the residence at his death to UKC for use in the Center;

in the event of dissolution of UKC all assets held by it for the benefit of the Center would be distributed to the Curators.³

Petitioner's motion to dismiss was overruled by the Court the order containing findings of fact and conclusions of law (Appendix C). The relevant findings and conclusions are:

The Scholars' Center is being established for the benefit of the University of Missouri-Kansas City and to serve the following purposes:

(a) as a supporting facility to the various schools of the University of Missouri-Kansas City;

(b) as a meeting place for all persons and groups devoted to promoting and maintaining the success of the various schools of the university of Missouri-Kansas City, and as a Center for the planning of programs to further the educational mission of the University of Missouri-Kansas City;

(c) as a catalyst and to bring to the Hospital Hill campus opportunities as a special gathering place for furthering exchanges, national and international felicitations, community meetings, social intercourse and cooperation in all reaches of scholarly endeavor.

The court found that the Center, and its use is an educational and public purpose; that the Curators had determined and declared by formal resolution that Petitioner's land was needed for the establishment of the Scholars' Center; that Petitioner's land was needed for establishment of the Scholars' Center; and that the Curators have determined that the establishment of the Scholars' Center is for a public purpose within the scope of its organization; namely for the benefit of the University of Missouri-Kansas City. The court found that necessity is a matter of legislative determination; that courts may inquire into necessity only if

3 UKC is a not-for-profit corporation with perpetual duration (Ex. 1) and there is no evidence that its dissolution will ever occur. The provision, in the event of dissolution, also conflicts with Dr. Dimond's trust which provides that on dissolution of UKC the property goes to Diastole if it exists, and if not to a private 501 (c)(3) corporation.

the condemnee alleges and proves the condemnor's claim of necessity constitutes fraud, bad faith or an arbitrary abuse of discretion; and that there was no such evidence.⁴

The matter was heard by a jury solely on the issue of damages. Its verdict awarding Petitioner \$70,000.00 (L.F. 70). Judgment was entered thereon (L.F. 71) and all post trial motions were overruled.

Petitioner timely appealed to the Court of Appeals of Missouri, Western District (L.F. 181), which upheld the trial court. Its opinion is Appendix A.

Motions for rehearing or transfer to the Missouri Supreme Court were denied (App. D) and a Motion for Rehearing in the Missouri Supreme Court was denied by that court on June 11, 1991 (App. E).

REASONS FOR GRANTING THE WRIT

The final decision of the Missouri court has expanded the use of condemnation far beyond the power of eminent domain authorized by prior decisions of this court. It gives state universities the unrestricted power to condemn lands for exclusive use by private agencies solely on the basis that some purposes of the private corporation benefit the university. It is a perversion of the "public use" doctrine with dangerous implications for abuse of the power of eminent domain. We find no decision of this court which supports this taking under the limited power delegated to state agencies, without a state legislative statement of the public policy to be served and without a legislative establishment of standards which would protect against the abuse of power.

The Missouri Court of Appeals' ruling has the effect of holding that any worthy private agency whose purposes are to benefit a public agency thereby becomes a public agency and the use of land by that private agency thereby becomes a public use, permitting the exercise of the power of condemnation by the public agency for the sole benefit of the

4 Finding of Fact 11 erroneously states that the gift of the remainder interest in the residence is to the "University of Missouri - Kansas City." A reading of Exhibit 28A makes it facially clear that the gift is to the University of Kansas City, a private corporation.

private agency. The effect of the ruling is to obliterate the distinction between private and public agencies, to substantially erode the significance of the constitutional prohibition against taking of private property for private use and to improperly expand the statutory power of the Curators far beyond the limits intended by the legislature.

The implications of this case go far beyond its facts. It would seem to permit the Curators to condemn lands for the entire Center or its further expansion and, by retaining title in the Curators, exempt it from real estate taxes, zoning restrictions and other police power regulations of the City. It would similarly permit taking by the University for privately operated campus ministries, student and faculty housing facilities, parking lots and bookstores, private clinics deemed supportive of the medical school, private research parks and industries supportive of the business school and any other private endeavors viewed by the Curators as beneficial.

The case has broader implications for thousands of state universities, state colleges and public school districts, other state agencies, public authorities and other public bodies. It could affect even more thousands of privately operated hospitals, museums, convention centers, auditoriums, libraries, and industries which are perceived as supportive of public agencies or the public generally.

I

Condemnation of private property by the Curators for use solely by a private not-for-profit corporation as a parking area for its privately owned and operated scholars' center is a violation of the due process clauses of the Fifth and Fourteenth Amendments, even though some of the purposes of the private corporation and the operation of the center are supportive of and beneficial to the state institution.

A. Taking for Private Use Is Prohibited

A condemnation for private use is forbidden by the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*,

208 U.S. 598 (1908). *O'Neill v. Leamer*, 239 U.S. 244 (1915). It is also forbidden by Article I, Section 28 of the Constitution of Missouri which provides that private property shall not be taken for private use, unless by consent of the owner. The "public use" requirement of the Fifth Amendment is made binding on the States by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendments Due Process Clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). The nature of the uses, whether public or private, is ultimately a judicial question. *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). The state court ruling is not binding on this court. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598 (1908).

This court has repeatedly held in the following cases that taking of private property for private use is prohibited.

City of Cincinnati v. Vester, 33 F.2d 242, 244 (6th Cir. 1929) aff'd. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930) held that excess condemnation of land in widening a street, for the purpose of selling such excess at a profit and using the proceeds to pay for the improvement, was not for a public use; that the city could be proceeding only under the "recoupment" theory, i.e. that it might be able to dispose of the property not used for the street at prices which would recoup much of the cost of construction; and that it was not sufficient that there were financial benefits to the condemnor, but that "public use" required "a use so dominantly and directly related to the public as to be indispensable to its welfare."

In *Missouri Pacific Railroad Co. v. Nebraska*, 164 U.S. 403 (1896) an order of the State Board of Transportation required a railroad company to surrender land to private persons for the purpose of building their grain elevator on it. The court held the order to be a taking of private property of the railroad for the private use of such persons, without the railroad's consent.

Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, (1875) held void a statute that authorized a town to issue bonds to aid a manufacturing enterprise, because the taxes necessary to pay the bonds would be a transfer of the property

of individuals to aid in the projects of gain of others and not for a public use in the proper sense of that term, even though in a collateral way the public benefits thereby. The court cited *Jenkins v. Anderson*, 103 Mass. 74, holding that a statute authorizing a town to aid by taxation a school established by the will of a citizen and governed by trustees selected by the will was void because the school was not under the control of the town officers and was therefore not a public purpose, and *Curtis v. Whipple*, 24 Wisc. 350, holding void a statute which authorized a town to aid a private school because, though a school of learning, it was a private enterprise not under control of the town authorities. Similarly *Cole v. City of La Grange*, 113 U.S. 1 (1885) so held.

In *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937), an administrative order of the Texas Railroad Commission prorating and limiting the production of natural gas was held unconstitutional, as applied, as a taking of private property for private use. The order was held to bear no reasonable relationship to the statutorily declared public policy of prevention of waste and the protection of correlative rights of owners in the common pool. The court found it was not instructed by a court decision as to the meaning of the statute and under a duty to make an independent study of the question.

Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891), held that, even though improvement of navigation is a public purpose, private property could not be condemned for the express use of creating a water power to be leased for manufacturing purpose where an unnecessary excess of water is created.

Cranfill v. Smith, 48 S.W.2d 891 (Mo. banc 1932) held that a condemnation, not authorized by City Charter or Statute, violated the Fourteenth Amendment and the Missouri Constitution. Other state courts have held that a state agency may not condemn land for private use. *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451, 458 (Fla. 1975) (parking facility for private shopping center); *City of West Palm Beach v. State*, 113 So.2d 374 (Fla. 1959) (civic

center to be leased to private corporation); *City of San Francisco v. Ross*, 279 P.2d 529 (Cal. 1955) (land to be leased for private parking garage); *Opinion to the Governor*, 76 R.I. 365, 70 A.2d 817 (R.I. 1950) (land to be leased for a marina and auditorium to be privately operated).

B. Diastole is Not a Public Corporation

Diastole is a private not-for-profit corporation having perpetual existence. It is the creature of the private benefaction of Dr. Dimond, formed and endowed by him and its operation is subject to the control of its board appointed under its By-laws; its officers are not public officers and its operation is not subject to the general control of the Curators or of the legislature; nor is it funded by the Curators.

An educational institution founded by private individuals or supported by private funds or privately endowed is considered a private corporation. Such an institution is the creature of private benefaction for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws, and visitation, and not to the general control of the government; and all these powers, rights, and privileges flow from the property of the founder in the funds assigned for the support of the institution. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).

Trustees for Vincennes University v. State of Indiana, 55 U.S. (14 How.) (1852) similarly so held, stating:

This corporation had no political powers, and [its officers] could in no legal sense be considered as officers of the State. They were not appointed by the State. Their perpetuity depended upon the exercise of their own functions; and they were no more responsible for the performance of their duties, than other corporations established by the State to execute private trusts.

Diastole has none of the characteristics of a public corporation unlike the drainage district in *O'Neill v. Leamer*, 239 U.S. 244 (1915). Its officers are not chosen by public elec-

tion and their powers, duties, compensation and terms of service are not prescribed by statute. Its sources of income and the uses to which it might be applied are not so predetermined. See also *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896).

The Missouri Supreme Court has twice held that placing public officials on the board of a beneficial nonprofit private agency does not make that organization a public agency, even though its purposes benefit the public. *Ruggeri v. City of St. Louis*, 429 S.W.2d 765 (Mo. 1968) held that the Convention and Tourist Board, a nonprofit association created for benevolent purposes, was a private corporation. The court said (l.c. 770):

Nor does placing the members of the Bureau, the Mayor, the Comptroller, and the President of the board, on the board of directors and executive committee of the Board . . . make the Board any more a public or governmental agency. When those city officers take such places in the private agency they simply exercise, in common with other officers of that agency, the powers that such agency has and nothing more.

State, ex rel. Board of Control v. City of St. Louis, 115 S.W. 534 (Mo. 1909) similarly so held, as to a private school and museum of fine arts.

C. Public "Benefit" is Not Public Use or Necessity

The fact that a private organization has worthy objectives does not make its use of property a "public use." The Constitution permits taking private property only for "public use"—not for public spirited use by private corporations. The fact that public bodies receive indirect benefits from the private use of property does not convert that use into a public one.

Although bare legal title of the land condemned has been retained by the Curators, all its use and benefit has been given to Diastole which is required to maintain it at its expense.

The university only benefits indirectly from the benefi-

cial purposes of the functions conducted by Diastole on its privately owned lands.

The opinion of the Court of Appeals (Appendix A) makes clear that Dr. Dimond formed and endowed Diastole as a private corporation for the express purpose of insuring that the Curators would not control its purposes and operation (A4, footnote 2).

City of Cincinnati v. Vester, 33 F.2d 242, 244 (6th Cir. 1929) aff'd 281 U.S. 439 (1930), *supra*, held that it was not sufficient that there were financial benefits to the condemnor, but that "public use" required "a use so dominantly and directly related to the public as to be indispensable to its welfare." The requirement has been framed in terms of public "necessity" or public "control." *Missouri Pacific Railroad Co. v. Nebraska*, 164 U.S. 403 (1896), *supra*. See *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1875), *supra*, pointing out that collateral public benefit is not sufficient for a public use and control by public authorities is required.

A compelling public necessity to correct an existing evil existed and was legislatively declared in *Berman v. Parker*, 348 U.S. 26 (1954) (slum clearance) and *Hawaii v. Midkiff*, 467 U.S. 229 (1987) (oligopoly and associated evils.)

D. Taking Cases Distinguished

One can differentiate the instant case from those which have upheld the power of condemnation for public purposes. One category involves condemnation by corporations declared to be public in nature, such as railroads or irrigation districts, and empowered by state constitution or general statute to condemn for the narrow use for which they were formed. The lands condemned were to be owned and used by the public corporation, not by a private corporation, and the takings were based on statutes of general application, declaring the public policy to be implemented by the takings.

Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159 (1896), involved an irrigation district formed under state statutes giving the district board the power to condemn lands for irrigation. The statute declared the use of proper-

ties required for irrigation of lands of a district to be a public use and what conditions must exist to permit inclusion of land within a district. The state constitution declared the use of water apportioned for sale or distribution to be public use subject to state regulation and control.

O'Neill v. Leamer, 239 U.S. 244 (1915), upheld condemnation of land by a drainage district for a drainage ditch. Nebraska statutes of general application authorized proceedings in which the district court could declare a drainage district to be a public utility conducive to the public convenience, health and welfare. As distinguished from the instant case the condemnation was by a public corporation for its own use, and necessary for the specific purpose such corporations were created. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905), similarly so held as to a railroad company.

Hairston v. Danville & Western Ry. Co., 208 U.S. 598 (1908), upheld a condemnation, authorized by state statute, by a railroad for a spur track one purpose of which was to reach a private industry. Although the private industry would benefit, the track was to be owned and operated by the railroad and used for storing cars and for loading and unloading by other industries. The extension of track was necessary to meet business demands of the city and the extension was for the use of the public and shippers generally.

This court has only upheld takings for ultimate private use in a very limited category. These cases involve situations where a state statute of general application establishes a public policy to be effectuated, or a public evil to be corrected, by authorizing condemnation by a public corporation and specifies the transfer of title or use to a private agency as a means by which to implement the public purpose. The familiar cases in this category relate to the public purpose of clearing blighted lands.

This is not a case such as *Berman v. Parker*, 348 U.S. 26 (1954) which upheld the District of Columbia Redevelopment Act providing for general use of condemnation to acquire slum areas and then sale or lease of the condemned

lands to private interests. The legislatively determined public purpose was the clearance of blighted lands. The Act in detail defined substandard housing conditions found to be injurious to public health, safety, morals and welfare; declared the public policy to be to correct and promote the public welfare by eliminating such injurious conditions by employing all means necessary for the purpose; and declared that acquisition was necessary to eliminate those conditions. The Act declared the acquisition and assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan to be a public use. It required the planning commission to develop a comprehensive land-use plan subject to approval after public hearing. The court found that the redevelopment of substandard housing and blighted areas was a proper exercise of the police power by the legislature which could therefore determine that private enterprise should be used to attain the object. As Mr. Justice Douglas stated: "Once the object is within the authority of congress, the right to realize it through eminent domain is clear. For the power of eminent domain is merely the means to the end" and "once the object is within the authority of congress, the means by which it will be attained is also for congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area."

The Curators have no general police powers nor general legislative powers. This case does not involve a legislative enactment granting the general power of condemnation for police power purposes, and enunciating a public policy, but instead a use of the powers for a single private agency by a state agency not having general police powers, without a legislative declaration of a public policy.

The instant case is distinguishable from *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). There a state statute created a Housing Authority with specific power to condemn property and to sell the land to lessees when, after a public hearing, the Authority determined that the State's acquisition of the tract would "effectuate the public purposes" of the Act. The stated public purpose was to regu-

late oligopoly and the associated evils. Extensive legislative hearings had established that a high percentage of the land in Hawaii was in the hands of a few large land owners; that this concentration skewed the residential fee simple market, inflated prices and injured the public welfare.

II

The taking is an unlawful delegation of legislative powers because there is no applicable legislatively declared public purpose with objective standards and the taking is beyond the limited delegated powers of the Curators.

Here no statute establishes a broad public policy or defines a public purpose with objective standards for its implementation. To hold this taking within the authority of the Curators would be an unconstitutional delegation of legislative power. There can be no proper delegation of powers unless the legislature has laid down a complete and definite declaration of policy and established objective standards and guide lines. *Schechter v. United States*, 295 U.S. 495 (1935) held that sections of the National Industrial Recovery Act were an unconstitutional delegation of legislative power to the president to establish codes for industry without establishing standards other than the statement of the general aim. Mr. Justice Cardozo, concurring, stated:

If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. (295 U.S. at 553)

Hague v. Committee For Industrial Organization, 307 U.S. 496 (1939) held unconstitutional an ordinance vesting arbitrary discretion in a municipal official without prescribing a uniform standard of official action, making enjoyment

of such rights depend on the uncontrolled decision of the official.

In *City of Cincinnati v. Vester*, 281 U.S. 439 (1930), the city council resolution, the only legislative declaration, stated merely that the excess condemnation was in furtherance of the public use. The court found that statement not conclusive.

Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted.

The court pointed out the necessity to specify the purpose of the appropriation and that the taking could not be for some speculative future use.

Neither the Missouri Constitution nor the applicable statute clarify the meaning of "a public purpose within the scope of its organization," nor establish any standards. The Curators' resolution, stating that the taking of the land for the use of the private agency is necessary in furtherance of the mission of the University, is a mere rephrasing of "a public purpose within the scope of its organization." As the court said in *City of Cincinnati v. Vester*, *supra*, this mere recital would give the Curators such sweeping authority as to make nugatory the express condition upon which the authority is granted.

Article IX of the Missouri Constitution provides only that the government of the state university is vested in a board of curators and that the general assembly shall adequately maintain the university and such other educational institutions as it may deem necessary.

The limited statutory authority delegated to the Curators to condemn private property is derived solely from three statutes.

R.S.Mo. §172.020, "Powers of Curators," (the statute upon which the Curators' resolution relies) provides that the

Curators may "condemn an appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization." This is the only statute which could be applicable.

R.S.Mo. 172.260. "Curators to improve and protect property," states:

It shall be the duty of the curators to provide for the protection and improvement of the site of the university of the state of Missouri, as selected and established by law; to erect and continue thereon⁵ all edifices designed for the use and accommodation of the officers and students of the university, and to furnish and adapt the same to the uses of the several departments of instruction.

The taking here cannot be upheld under this section because it is not an improvement of the site of the university as established by law.

R.S.Mo. §172.273. "Research, development and office parks established," provides in relevant part that the curators may establish research, development and office park projects, to promote cooperative relationships and to provide for shared resources between private agencies, and the university, for the advancement of the university in carrying out its vocational mission declaring such projects to be in furtherance of the purposes of the university; and that the curators may condemn land for such purposes and enter into leases for development of the project. This statute is not applicable because of its narrow limit to research, development and office parks.⁶

If the authority to condemn exists here it must be under the broad language of 172.020 "to condemn for any public purpose within the scope of its organization." It is therefore necessary to examine Missouri Decisions and the applicable rules of statutory construction.

5 The opinion of the Missouri Court of Appeals (Appendix D) omits the critical word "thereon."

6 It is significant that this detailed statute enacted in 1986, was deemed necessary and passed to permit condemnation of lands for the UMKC Research Park.

Only two Missouri decisions construe the Curators' power to condemn. *Curators v. Neill*, 397 S.W.2d 666 (Mo. 1966) held that the university could own and operate a parking lot on the university campus. *Board of Regents v. Palmer*, 204 S.W.2d 291 (Mo. 1979) held that a university can condemn land for a dormitory to be built and owned by it. Each came under the authority in R.S.Mo. 172.260 "to improve the site of the university," or "to erect edifices thereon for the use of its students."

A. Strict Construction is Required of Statutes Interfering With Private Property Rights

The power conferred on a municipality to take private property for public use must be strictly construed, *City of Cincinnati v. Vester*, 281 U.S. 439 (1930).

Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904) held that a congressional act giving telegraph companies the right to construct lines over the public domain did not grant them the right to condemn rights of way of railway companies. The court said "The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication."

In *Interstate Commerce Commission v. Cincinnati N.O. & T. RR. Co.*, 167 U.S. 479 (1897) the court said it found no provision of the Act that expressly or by necessary implication conferred such power and "that Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language." See also *Street v. Lincoln Safe Deposit Co.*, 254 U.S. 88, 65 L.Ed 151, 41 S.Ct. 31 (1920).

Cranfill v. Smith, 48 S.W.2d 891, 893 (Mo. En Banc) (1932) held condemnation proceedings to be in derogation of common right and the rule of strictissimi juris is applied.

B. Strict Construction Required of Power Delegated to State Agencies

The scope of sovereignty delegated to municipal corporations must be strictly construed and any fair, substantial,

and reasonable doubt concerning the existence of any power, or any ambiguity in the statute upon which the assertion of such power rests, is to be resolved against the corporation and the power denied. A power may not be implied as incidental to powers expressly granted merely because it is useful or convenient; it must be indispensable to the attainment of the declared objects and purposes of the corporation. *Water, Light & Gas Co v. Hutchinson*, 207 U.S. 385 (1907); *Detroit Citizens Street Ry. Co v. Detroit R. Co.*, 171 U.S. 48 (1898).

III

There was a denial of procedural due process because the only determination of public use or public purpose was by a resolution of the Curators at a closed meeting, without notice or public hearing and without evidence of supporting facts and judicially unchallenged.

The resolution (App. B) states solely that the acquisition is necessary for the public purpose of developing the Scholars' Center facility to further the educational mission of the University. This conclusionary statement without supporting evidence is the sole determination that the taking is within the Curators' limited delegated authority to condemn "for public purposes within the scope of its organization."

This determination of "necessity for public purpose" was accepted by the trial judge who found that the Curators had determined that the land was needed for the establishment of the Center and that the establishment of the Center is for a public purpose within the scope of its organization, namely for the benefit of the University of Missouri-Kansas City. The court further found that necessity is a matter of legislative determination and that it could inquire into necessity only for fraud, bad faith or arbitrary abuse of discretion, which the court found did not exist (App. C) (A16-A17).

The opinion of the Court of Appeals (App. A) again found

the public purpose to be for the use by Diastole as a parking lot for the benefit of the university (A3-A5) and that its use is to further the mission of the university. The court held that while the question of public use is a judicial question, the issue of public necessity is a political question to be decided by the entity exercising the power of condemnation. The court's opinion finds that the Curators and Dr. Dimond agreed "that it was necessary for *the development of the Center* that the Curators acquire the Brown property for parking to serve the Center" (A2) (emphasis ours). However a finding of necessity for use by the Center is neither a finding of public use nor a finding of public necessity. In so holding both courts confused the issue as to the necessity for the use of the parking area by Diastole (the Curators' determination) with a necessary public use or purpose (which should have been for judicial determination).

Missouri decisions do hold that the question of whether the taking of any particular private property is "necessary" for condemnor's purpose, and the extent and location of the property to be taken, is a matter of legislative determination; *Missouri Public Service Co. v. H&W Investment Co.*, 602 S.W.2d 41, 43 (Mo.App. 1980) (public utility); *Tierney v. Planned Indus. Expansion Auth.*, 742 S.W.2d (Mo. banc 1987) (whether particular land is blighted). In such cases the taking is for a purpose recognized as a public use.

The issue here, improperly left to the determination of the Curators, was whether it was necessary, within the narrow delegated authority to condemn for public purposes within the scope of its organization, to condemn a parking lot for use of a private corporation. Neither the Curators' resolution nor the courts' opinions deal with the critical issue, i.e. is the condemnation for a necessary university use within the authority of the Curators? The courts' opinions equate the all encompassing term "benefit" with "public (university) use" and necessity.

Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159 (1896), delineated the due process requirements in condemnations by public corporations with statutorily delegated powers. Upholding the constitutionality of the statute the

court pointed out that: (1) the state constitution declared the use of water for distribution a public use subject to regulation; (2) the statute specifically declared the use of waters for irrigation together with rights of way for carrying out the purposes of the act to be a public use based on the public necessity for irrigation because of enormous tracts of arid land; (3) such use must be declared as a public use or no general scheme of irrigation could be formed; and (4) the statute specified a general statement as to what conditions must exist to permit inclusion of land within a district.

The statute required a public proceeding by the county board of supervisors to form a district and delineate its boundaries; an election to determine if it should be formed; and an election to authorize bonds for acquisition of property. The court found that under the Act property owners upon notice were provided a hearing on the question as to whether their property would benefit by inclusion in the district. The court concluded that the board upon hearing must establish necessary facts in establishing and defining the boundaries.

Southern Ry. Co. v. Commonwealth of Virginia, 290 U.S. 190 (1933) held a statute authorizing the highway commissioner, without notice or hearing or provision for review, to require a railroad to abolish grade crossings and construct overhead crossings necessary in the commissioner's opinion for public safety violated the due process clause even though the statute as construed permitted judicial review for arbitrary action. The commissioner's decision was final as to whether public convenience and necessity require the elimination. The court found the statute permitted a taking by a final decision of an administrative officer in respect to facts – the character of a crossing and what is necessary for public safety and convenience – without notice, hearing or evidence, and not subject to general review. The court said that although a state legislature may determine what public welfare demands, it does not follow that an administrative officer is so empowered, without notice or hearing to act with finality to take private property.

Chicago M & St. P. Ry. Co v State of Minnesota, 134 U.S. 418 (1890) held that a statute authorizing a railroad commission to fix rates without a hearing deprived the carriers of property without due process in so far as it made final and conclusive the decision of the commission as to what are reasonable charges.

See also *Connecticut v Doebr*, 115 L.Ed.2d 1 (1991), in which this court held a state statute authorizing an *ex parte* rejudgment attachment of realty without bond and absent exigent circumstances to be a taking of property without due process of law.

CONCLUSION

For these various reasons this petition for certiorari should be granted.

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September 6, 1991

APPENDIX A

MISSOURI COURT OF APPEALS

WESTERN DISTRICT

**THE CURATORS OF THE UNIVERSITY OF MISSOURI,
Respondent,**

vs.

ARTHUR BROWN, et al., Appellants

WD43426

Opinion filed: March 19, 1991

**APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI**

Honorable Thomas C. Clark, Judge

Before Berry, P.J., Turnage, and Gaiten, JJ.

The Curators of the University of Missouri brought this action in condemnation to acquire property owned by Arthur Brown. Brown challenged the right of the Curators to acquire his property by alleging that the taking was for a private use and not a public use. The court found the taking was for a public use. A trial fixed the value of Brown's property and Brown appeals on the sole ground that his property is being taken for private use in violation of Art. I, § 28 of the Missouri Constitution. Affirmed.

Dr. E. Grey Dimond is recognized as the founder of the Medical School at the University of Missouri at Kansas City. For some years Dr. Dimond served as provost of Health Sciences at UMKC and is presently provost emeritus and a professor of medicine. Dr. Dimond and his wife, Mary, acquired property just south of the Medical School on which they built their residence. Several years ago, Dr. Dimond decided to devote his property to the use of a Scholars' Center for the University. To accomplish this Dr. Dimond conveyed much of his property to a not-for-profit corporation, Diastole-Hospital Hill, Inc. Thereafter, a series of agree-

ments were entered into between Dr. Dimond, Diastole, the Trustees of the University of Kansas City, and the Curators.¹ It is not necessary to detail these agreements but the substance was that Dr. Dimond conveyed certain of his property to Diastole reserving the right to live in his home as long as he lives. Dr. Dimond made a gift to the Trustees of the University of Kansas City of securities worth over \$300,000 which will have a value of about one million on their maturity in 2000 for the purpose of endowing the operation of the Scholars' Center. An agreement between the Curators, Dr. Dimond, Diastole and the University of Kansas City reflected that the Curators had agreed to the establishment of a Scholars' Center in accordance with Dr. Dimond's plans and that it was necessary for the development of the Center that the Curators acquire the Brown property for parking to serve the Center.

Chancellor Russell of UMKC stated that Scholars' Centers are common at universities and most are privately funded. He stated the University is enthusiastic about the establishment of the Center. He explained that the Center will be on the Hospital Hill Campus which is some distance from the Volker Campus. The Hospital Hill Campus includes the Medical and Dental Schools and the future location of the Pharmacy School. Also included at this location are Truman Medical Center and Children's Mercy Hospital, the teaching hospitals for the medical school. Russell stated parking is very limited at the Hospital Hill Campus and if the Scholars' Center should ever cease to operate, the land in question here would be used for other university parking.

Brown urges several grounds for reversal of the trial court's finding that the Curators sought his land for a public use, but all of these arguments boil down to the single argu-

1 The University of Kansas City was a private operating University prior to 1963 when it conveyed all of its property to the Curators so that the Curators could operate the University of Missouri at Kansas City as a part of the University of Missouri system. The University of Kansas City continues to exist for the sole purpose of supporting the University of Missouri at Kansas City. The Trustees of the University of Kansas City acquire property and raise funds for UMKC.

ment that because the Scholars' Center is located on land which is not owned by the Curators its acquisition is for the private purpose of Diastole, or Dr. Dimond. Brown relies upon a number of cases which hold that a public entity may not acquire property for use by a private entity through the use of the power of condemnation. No fault can be found with those cases but they are simply inapplicable to the facts of this case.

Section 172.020, RSMo 1986, gives the Curators the power to condemn real estate for any public purpose within the scope of its organization. In *State v. Neill*, 397 S.W. 2d 666, 670 (Mo. banc 1966), the court held:

It is the clear intent of the Constitution and statutes to confer on the Curators the authority to select sites on which to carry out the functions of the University and to acquire real estate for such purposes by purchase or condemnation. It is also clear that the Curators are authorized to construct improvements on the real estate constituting the site of a University function.

* * *

It is too late in the motor age to contend successfully that parking facilities are not a necessary adjunct of the proper use of improved real estate.

From *Neill*, it is clear that the Curators have power to acquire land by condemnation for the purpose of providing parking facilities for University use. The argument here that because the Scholars' Center is on land owned by others than the Curators that this transforms the Scholars' Center into a private use is erroneous. The Scholars' Center is designed solely for use for University purposes to provide a supporting facility to the various schools of the University of Missouri at Kansas City. It is to be used only as a meeting place for persons and groups devoted to promoting and maintaining the success of the various schools at UMKC and as a catalyst to bring to the Hospital Hill Campus opportunities for furthering national and international exchange, and social intercourse in all reaches of scholarly endeavors. The Curators approved the establish-

ment of the Scholars' Center to support the University knowing that the Center was actually located on land not owned by it. However, the various agreements provide that the Center shall retain its use in conjunction with the University to prevent the Center from becoming a strictly private enterprise. Thus, there is assurance that the Center will operate as a part of the University. In addition, Dr. Dimond has made generous gifts to assure the construction and operation of the Center. These gifts have been made with provisions that the funding and management of Diastole cannot be changed. Thus, the Center is established, endowed and structured so that it will retain its purpose as a Scholars' Center for the benefit of UMKC.²

The Brown property will become the property of the Curators and will remain the property of the Curators. There is no agreement or plan on the part of the Curators to transfer the Brown land to any other entity. Further, the agreements provide that the Brown property shall be used in connection with the Center or such future use in connection with UMKC as may be determined by the Curators.

The agreements do provide that Diastole will donate sufficient funds to the Curators to cover the costs and expenses incurred by the Curators in the acquisition of the Brown property and to cover all expenses. Diastole further agrees that it would pay the expenses of improving, maintaining, and operation of the Brown property to be used in conjunction with the Scholars' Center. Brown contends that because the costs and expenses of acquiring the property are to be paid by Diastole that this further indicates a private, rather than a public, use of the property. In *Arata v. Monsanto Chemical Co.*, 351 S.W.2d 717, 721[3] (Mo. 1961), the court stated that:

2 Dr. Dimond stated the reason he gave the land to Diastole and the endowment to the University of Kansas City was to insure that the Center would be operated only for the benefit of UMKC. He feared that if the land and endowment were given to the Curators that it would be possible for the Center to lose its distinctive Kansas City purpose because the Curators are responsible for the operation of Campuses at Columbia, Rolla and St. Louis in addition to Kansas City.

[I]t is settled that the mere fact that certain individuals or interest who are specially benefited[sic] by a proposed improvement contribute to the cost thereof does not show that the improvement is for a private purpose or render it any the less public within the meaning and scope of the law of eminent domain.

Thus, the fact that Diastole contributes the money to cover the costs of acquiring the property does not convert the public use to a private use.

It is further stated in *Arata*:

Nor does the mere fact that the advantage of a public improvement also inures to a particular individual or group of individuals deprive it of its public character. Quoting from *Kansas City v. Liebi*, 298 Mo. 569, 593, 252 S.W. 404, 408.

Id. at 721.

Although the Scholars' Center is located on land not owned by the Curators, it is devoted to a use to further the mission of the University of Missouri at Kansas City.³ The continued use of the Center for use by the University is insured by agreements and the organizational structure of Diastole. The use of the Center for public educational use is insured just as is the use of facilities located on land owned by the Curators. The Curators have the power to condemn land to provide parking for its educational facilities and the Brown land is to be used for parking in conjunction with the Scholars' Center which is devoted to University purposes. The fact that parking spaces for the Scholars' Center may benefit Diastole does not convert the use which the Curators propose to make the Brown property into private use under the facts present here.

Brown makes some argument that other land is available for parking and that this land is not necessary. It is also held in *Arata* that there is a distinction between public use and public necessity. The question of public use is

3 The Curators seek leave to file a 1990 schedule showing usage of the Center. Brown objects to the schedule being filed. The objection is sustained and the schedule has not been considered by this court.

a judicial one while the issue of public necessity is a political question to be decided by the entity exercising the power of condemnation. *Id.* at 721. The question of public use has been decided and the question of necessity was decided by the body charged with making that decision—the Curators.

The judgment is affirmed.

WILLIAM E. TURNAGE, Judge

All concur.

APPENDIX B**EXTRACT FROM MINUTES OF BOARD OF CURATORS
MEETING HELD DECEMBER 18, 1987**

It was recommended by Chancellor Russell, approved by President Magrath, recommended by the Physical Facilities Committee, moved by Curator Lichtenegger and seconded by Curator Epple that the following resolution be adopted:

A RESOLUTION APPROVING THE ACQUISITION BY THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI OF PROPERTY OWNED BY ARTHUR BROWN LOCATED AT 2510 AND 2512 CHARLOTTE STREET, KANSAS CITY, JACKSON COUNTY, MISSOURI.

WHEREAS, the Board of Curators of the University of Missouri has authorized the establishment of the Scholars' Center facility for the benefit and use of the University of Missouri; and

WHEREAS, the Curators of the University of Missouri, a public corporation, has negotiated with Arthur Brown and attempted to purchase the property herein described for just, fair and reasonable compensation; and

WHEREAS, the acquisition of the real estate herein described is necessary for the public purpose of developing, constructing and establishing the Scholars' Center facility to further the educational mission of the University of Missouri; and

WHEREAS, the property owned by Arthur Brown commonly known and located at 2510 and 2512 Charlotte Street is a parcel of land in Jackson County, Missouri, more particularly described as follows:

Lots Five (5), Six (6) and Seven (7) of J. L. Porter's Second Subdivision, a subdivision in the City of Kansas City, Jackson County, Missouri, according to the recorded plat thereof.

NOW, THEREFORE, BE IT RESOLVED, BY THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, BEING THE GOVERNING BODY OF THE BODY POLITIC AND PUBLIC CORPORATION KNOWN AS THE CURATORS OF THE UNIVERSITY OF MISSOURI, AS FOLLOWS:

That the institution of condemnation proceedings is hereby authorized to acquire said property owned by Arthur Brown, and herein described, along with all leasehold and possessory interest and rights of parties in possession, under the power of condemnation of real estate as provided in Section 172.020 RSMo (1977) for the public purpose of furthering the educational mission of the Curators of the University of Missouri, a public corporation, in developing, constructing and establishing the Scholars' Center facility for the benefit and use of the University of Missouri.

Upon roll-call vote, the result was as follows:

Curators Voting Yes: Curator Bates
 Curator Cook
 Curator Epple
 Curator Frazer
 Curator Lichtenegger
 Curator Raven
 Curator Sterling
 Curator Turner

Curator Voting No: None

The motion having received the affirmative vote of eight of the members of the Board, the President declared the motion carried and the motion adopted, this 18th day of December, 1987.

* * * * *

I, ROBERT L. ROSS, Assistant Secretary to the Board of Curators of the University of Missouri, hereby certify that the foregoing is a true and complete copy of an action taken by the said Board at a meeting held on December 18, 1987, as the same appears in the records of said meeting.

A9

Witness my hand and the official seal of The Curators
of the University of Missouri this 2nd day of February, 1988.

ROBERT L. ROSS
Robert L. Ross, Assistant
Secretary to the Board of
Curators

APPENDIX C

**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI**

**THE CURATORS OF THE UNIVERSITY OF MISSOURI,
Plaintiff,**

v.

ARTHUR BROWN, et al., Defendants

Case No. CV88-8946

Docket "C"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Dated April 4, 1989)

The Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On September 11, 1987, the Curators of the University of Missouri (hereinafter "the Curators") duly authorized the Vice President for Administrative Affairs, James T. McGill, to enter into an agreement on behalf of the Curators with Diastole-Hospital Hill, Inc. (hereinafter "Diastole") and Dr. E. Grey Dimond (hereinafter "Dr. Dimond") for the establishment of a Scholar's Center, and said agreement was duly executed. (Attached as Plaintiff's Exhibit 6.)

2. On November 16, 1988, the Curators entered into another agreement with Diastole, Dr. Dimond, and the University of Kansas City which further stated the Curators' intentions and plans for the establishment of the Scholar's Center. (Attached as Plaintiff's Exhibit 28-A.)

3. Diastole is a Missouri not-for-profit corporation whose current board of directors is comprised of the following persons:

(a) Dr. Dimond

(b) Henry A. Mitchell, a full-time employee of the University of Missouri-Kansas City; and

(c) Harry S. Jonas, a former Dean and current professor of the Medical School of the University of Missouri-Kansas City.

(Bylaws of Diastole-Hospital Hill, Incorporated, attached as Plaintiffs Exhibit 33.) Diastole is a charitable foundation established for the purpose of managing the Scholars' Center.

4. The University of Kansas City (hereinafter "Trustees") is a not-for-profit corporation whose purpose is to benefit the University of Missouri-Kansas City.

5. Dr. Dimond is the founder of the medical school at the University of Missouri-Kansas City and is currently Emeritus Provost and an active full professor at the medical school.

6. The Scholar's Center is being established for the benefit of the University of Missouri-Kansas City and to serve the following purposes:

(a) as a supporting facility to the various schools of the University of Missouri-Kansas City;

(b) as a meeting place for all persons and groups devoted to promoting and maintaining the success of the various schools of the University of Missouri-Kansas City, and as a Center for the planning of programs to further the educational mission of the University of Missouri-Kansas City;

(c) as a catalyst and to bring to the Hospital Hill campus opportunities as a special gathering place for furthering exchanges, national and international felicitations, community meetings, social intercourse and cooperation in all reaches of scholarly endeavor.

7. To establish the Scholars' Center, Dr. Dimond has made a Deed of gift to the Trustees in the amount of \$337,086.75 in securities to mature August 15, 2000 with a value at maturity of \$1,001,000 to provide funds for the maintenance, operation and improvement of the Scholars' Center. (Attached as Plaintiffs Exhibit 17.)

8. The use of those funds for the benefit of the Scholars' Center is controlled through the following five person board:

(a) the Chancellor of the University of Missouri-Kansas City;

(b) the Dean of the Medical School of the University of Missouri-Kansas City;

(c) the Dean of the Dental School of the University of Missouri-Kansas City;

(d) a person appointed by the Mayor of the City of Kansas City Missouri, and selected by the Mayor from a panel of three names submitted by the Chancellor of the University of Missouri-Kansas City;

(e) the manager of the Scholars' Center who will be an employee of the University of Missouri-Kansas City.

The management of said funds is to be exclusively for the Scholars' Center and for the benefit of the University of Missouri-Kansas City.

9. Dr. Dimond has provided in the E. Grey Dimond Trust Indenture and in his Last Will and Testament that all of the assets of this estate will be used by the Trustees for the purpose of establishing, maintaining, operating and improving the Scholars' Center. (Attached as Plaintiff's Exhibit 16 and Plaintiff's Exhibit 18.)

10. The use of the assets of Dr. Dimond's estate is to be controlled through the same five person board previously described in paragraph 8. The management of said assets is to be exclusively for the Scholars' Center and for the benefit of the University of Missouri-Kansas City.

11. Dr. Dimond owns Lots 1 through 5 and the North 8 feet of Lot 6 in Duquesne Heights, and by Exhibits 6 and 28-A he has agreed that said property will be used as a Scholars' Center. He has agreed to make a present gift of the remainder interest in said property to the University of Missouri-Kansas City for the use of the Scholars' Center.

12. Diastole owns Lots 1 through 4 and Lot 8 in Block 1 of J. L. Porter's 2d Subdivision and the South 17 feet of Lot 6 and the North 17 feet of Lot 7 in Duquesne Heights

and by Exhibits 6 and 28-A it has agreed that said property will be used as a Scholars' Center.

13. When Dr. Dimond no longer serves on the board of Diastole, its By-Laws provide that the board will consist of five members:

- (a) the Chancellor of the University of Missouri-Kansas City;

- (b) the Dean of the Medical School of the University of Missouri-Kansas City;

- (c) the Dean of the Dental School of the University of Missouri-Kansas City;

- (d) a person appointed by the Mayor of the City of Kansas City Missouri, and selected by the Mayor from a panel of three names submitted by the Chancellor of the University of Missouri-Kansas City;

- (e) the manager of the Scholars' Center who will be an employee of the University of Missouri-Kansas City.

14. Diastole has agreed that it will not amend the provisions of its By-Laws set forth in the preceding paragraph without the consent of the Chancellor of the University of Missouri-Kansas City.

15. Based upon the findings of the foregoing paragraphs and upon the testimony in this case, it is the finding by this Court that Dr. Dimond is committed without reservation to the establishment of the Scholars' Center; and that same will be operated and managed for the purposes stated in paragraph 6 and for the use and benefit of the University of Missouri-Kansas City.

16. It is the finding of this Court that the Scholars' Center, and its use as aforesaid, is an educational and public purpose.

17. The following real property, all located immediately south of the Hospital Hill Campus, will comprise the Scholars' Center:

Lots 1 through 8, Block 1, in J. L. PORTER'S 2ND SUB-DIVISION and Lots 1 through 6 and the North 17 feet of Lot 7 in Duquesne Heights.

Within that description is the land located at 2510-2512 Charlotte Street, which is the subject of this action and which is described as follows:

Lots 5, 6 and 7, Block 1, J. L. PORTER'S 2ND SUBDIVISION, a subdivision in Kansas City, Jackson County, Missouri, according to the recorded plat thereof.

18. It has been determined by the Curators and declared by formal resolution, that the land located at 2510-2512 Charlotte Street is needed and required by plaintiff for the establishment of the Scholars' Center.

19. It is the finding of this Court that the land located at 2510-2512 Charlotte Street is needed and required for the establishment of the Scholars' Center.

20. The land located at 2510-2512 Charlotte Street will remain under the ownership of the Curators.

21. The land located at 2510-2512 Charlotte Street will remain under the control of the Curators and any changes to or improvements of said land by the management of the Scholars' Center will require approval by the Curators.

22. On December 18, 1987, the Curators duly authorized an offer of \$32,000 to Mr. Arthur Brown, owner of the property located at 2510-2512 Charlotte Street in Kansas City, Missouri.

23. The purpose of that authorization by the Curators was to facilitate the purchase of property deemed necessary for the establishment of the Scholars' Center.

24. The amount of that offer, \$32,000, was based on two appraisals which were made at the request of the Curators, and which are described as follows: (a) an appraisal by Bliss & Associates, Inc. which states that the fair market value of the property located at 2510-2512 Charlotte Street in Kansas City, Missouri is \$30,000; (b) an appraisal by Flanagan/Summers & Associates, Inc. which states that the fair market value of the property located at 2510-2512 Charlotte Street is \$32,000.

25. Pursuant to the authorization by the Curators, James T. McGill, Vice President for Administrative Affairs, made an offer to Arthur Brown of \$32,000 for the purchase of

the property located at 2510-2512 Charlotte Street, Kansas City, Missouri, and said offer was transmitted to Arthur Brown by letter dated December 2, 1987.

26. Arthur Brown did not respond to the Curators' offer of \$32,000 for the purchase of his property located at 2510-2512 Charlotte Street, Kansas City, Missouri.

27. In February, 1988, the attorneys for the University of Missouri, by letter, reiterated the Curators' \$32,000 offer to Mr. Brown and urged Mr. Brown to contact Mr. McGill in response to the offer. Mr. Brown contacted Mr. McGill by telephone and stated that he believed his property was worth more than \$32,000 based on a capitalization of income method of valuation. Pursuant to that conversation, the University of Missouri sent Emmett Klinkerman and James Bunton, from Columbia, Missouri to Kansas City, Missouri, in order to further negotiate with Arthur Brown for the purchase of the property located at 2510-2512 Charlotte Street.

28. Based on the capitalization method suggested by Mr. Brown, Mr. Klinkerman made an offer to Mr. Brown by letter of March 3, 1988, of \$60,000 for the purchase of said property. That \$60,000 offer was made subject to the approval of the Curators. Mr. Brown did not accept and did not respond to the \$60,000 offer made by Mr. Klinkerman.

29. In light of the jurisdictional requirements for condemning property in Missouri, the University determined that the \$32,000 offer should be extended to Mr. Brown as a firm written offer, without conditions. On March 23, 1988, James T. McGill, Vice President of Administrative Affairs, sent an offer letter to Mr. Brown for \$32,000 for the purchase of said property. This was a firm offer and was not contingent upon approval by the Curators. Mr. Brown received that offer letter through the mail. Mr. Brown did not accept that firm offer of \$32,000 for the purchase of the property.

30. The Curators, by their duly authorized representatives, have made good faith efforts to negotiate the purchase of the property located at 2510-2512 Charlotte Street, but the University and Mr. Brown have been unable to agree

upon the proper compensation to be paid for the land, property and rights sought to be acquired.

31. On December 18, 1987 the Curators duly authorized, by resolution, the condemnation of the property located at 2510-2512 Charlotte Street in Kansas City, Missouri for the purpose of establishing a Scholars' Center.

32. The Curators of the University of Missouri have determined that the establishment of the Scholars' Center is for a public purpose within the scope of its organization, namely for the benefit of the University of Missouri-Kansas City.

CONCLUSIONS OF LAW

1. The Court finds that the Curators of the University of Missouri is a public corporation duly organized and existing by virtue of the laws of the State of Missouri, and it is the legal entity of the State of Missouri that governs and operates the University. Mo. Rev. Stat. § 172.020 (1986); Constitution of Missouri, Art. IX. Sec. 9(a).

2. The Court finds that the Curators is authorized to condemn and appropriate real estate or other property, or any interest therein, for any purpose within the scope of its organization. Mo. Rev. Stat. § 172.020 (1986).

3. The Court finds that it is the Curators' duty to provide for the protection and improvement of the site of the University of the State of Missouri and to erect . . . all edifices designed for the use and accommodation of the officers and students of the University, and to furnish and adapt the same to the uses of the several departments of instruction. Mo. Rev. Stat. § 172.260 (1986).

4. The Court finds that the Scholars' Center will serve to carry out the Curators' duty as described in the preceding paragraph.

5. The Court finds that the Scholars' Center will serve to further the educational mission of the University of Missouri-Kansas City, and therefore, the Curators' condemnation of the land located at 2510-2512 Charlotte Street is for a public purpose within the scope of its organization. Mo. Rev. Stats. §§ 172.020 and 172.260 (1986).

6. The Court finds that the Curators have determined

and declared, at a duly authorized meeting, that the land located at 2510-2512 Charlotte Street is necessary for the establishment of the Scholars' Center. The Curators have the power to make such a determination. Mo. Rev. Stats. §§ 172.020 and 172.260 (1986); Constitution of Missouri, Art. IX, Sec. 9(a).

7. The Court recognizes that necessity is a matter of legislative determination. *Missouri Public Service v. HNW Investment*, 602 S.W.2d 41, 43 (Mo. App. 1980); *Mapco, Inc. v. Williams*, 581 S.W.2d 402, 405 (Mo. App. 1979).

8. The Court recognizes that the Courts may inquire into necessity only if the condemnee alleges and proves the condemnor's claim of necessity constitutes fraud, bad faith or an arbitrary or unwarranted abuse of discretion. *Missouri Public Service*, 602 S.W.2d at 43; *Mapco*, 581 S.W.2d at 405. The Court finds that there are no such claims in this case and no evidence to support any such claims.

9. The Court finds that the land located at 2510-2512 Charlotte Street is needed for the establishment of the Scholars' Center.

10. The Court finds that the Curators, at a duly authorized meeting, approved an offer of \$32,000 to Mr. Arthur Brown for the purchase of the property located at 2510-2512 Charlotte Street, and that offer was made to Mr. Brown on March 2, 1988 as a firm, non-contingent offer.

11. The Court finds that the Curators have conducted good faith negotiations for the purchase of the property at 2510-2512 Charlotte Street and cannot come to an agreement with Mr. Brown for its purchase.

12. The Court finds that it has been proved in this case that the condemnor and the owner are unable to agree on compensation and that a valid offer was made by the condemnor and rejected by the owner.

Dated: April 4, 1989

THOMAS C. CLARK
Judge Thomas C. Clark

APPENDIX D

MISSOURI COURT OF APPEALS

WESTERN DISTRICT

1300 Oak Street
Kansas City, Mo. 64106-2970

April 30, 1991

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD
RE: THE CURATORS OF THE UNIVERSITY OF MISSOURI,
RESPONDENT
vs.
BROWN, ARTHUR, ET AL., APPELLANT

WD# 43426

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

No. 73791
W.D. No. 43426

May Session, 1991

The Curators of the
University of Missouri

Respondent,

vs. (TRANSFER)

Arthur Brown, et al.,

Appellants.

Now at this day, on consideration of appellants' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1991, and on the 11th day of June, 1991, in the above entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 11th day
of June, 1991.

THOMAS SIMON, Clerk
_____ D.C.

APPENDIX F**REVISED STATUTES OF MISSOURI, 1977****172.020. Corporate name—powers of curators—
restrictions on dealings in real property,
timber or minerals**

The university is hereby incorporated and created a body politic and shall be known by the name of "The Curators of the University of Missouri", and by that name shall have perpetual succession, power to sue and be sued, complain and defend in all courts; to make and use a common seal, and to alter the same at pleasure; to take, purchase and and to sell, convey and otherwise dispose of lands and chattels, except that the curators shall not have the power to subdivide, sell or convey title to any land contained within a university campus or to subdivide, sell or convey title to any portion of any parcel of land containing in excess of twenty-five hundred contiguous acres unless such transaction is approved by the general assembly by passage of a concurrent resolution signed by the governor. The curators shall not sell, trade or otherwise convey or permit the severance of timber, minerals or other natural resources, if the timber, mineral or natural resource has a value of at least five hundred dollars, unless the curators have requested and solicited public bids by advertising for ten days in one newspaper in the county where the timber, mineral or other natural resource is located and by advertising for ten days in two daily newspapers in the state which have not less than fifty thousand daily circulation. The curators also shall send a notice of the proposed sale to the governor, state auditor, chief clerk of the house of representatives and secretary of the senate not later than the same day the advertisement for public bid is first scheduled to appear; to act as trustee in all cases in which there be a gift of property or property left by will to the university or for its benefit or for the benefit of students of the university; to condemn an appropriate real estate or other property,

or any interest therein, for any public purpose within the scope of its organization, in the same manner and with like effect as is provided in chapter 523, RSMo, relating to the appropriation and valuation of lands taken for telegraph, telephone, gravel and plank or railroad purposes; provided, that if the curators so elect, no assessment of damages or compensation under this law shall be payable and no execution shall issue before the expiration of sixty days after the adjournment of the next regular session of the legislature held after such assessment is made, but the same shall bear interest at the rate of six percent per annum from its date until paid; and provided further, that the curators may, at any time, elect to abandon the proposed appropriation of property by an instrument of writing to that effect, to be filed with the clerk of the court and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages or compensation shall be void.